FILED
OCT 28 1982
ALEXANDER L. STEVAS,

82-453

IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarly situated, collectively and as a class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarly situated, collectively and as a class,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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DI CESARE - Printing — 331-4101 — Washington, D.C. 20004

TABLE OF CONTENTS

Introduction 1

Argument 2

I. The Decision of TECA Creates a Conflict Among the Circuits Concerning the Jurisdictional Parameters of TECA. This Court Should Grant Certiorari to Establish The Parameters of TECA's Jurisdiction 2

II. TECA has Decided a Question of Substantial Federal Importance that this Court has not Previously Considered. This Court Should Grant Certiorari to Consider this Issue of Substantial Federal Importance 6

Conclusion 10

TABLE OF AUTHORITIES

A. Cases

Atlantic Richfield Company v. Department of Energy, 655 F.2d 227 (TECA 1981) 3

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) 5

Bray v. United States, 423 U.S. 73 (1973) 2

Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 591 F.2d 711 (TECA 1979), *cert. denied* 444 U.S. 879 6

Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979) 2

Gardner v. New Jersey, 329 U.S. 565 (1947) 5

Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978), *cert. denied* 441 U.S. 962 6

Texaco, Inc. v. Department of Energy, 616 F.2d 1193 (TECA 1979) 6

United States v. Uni Oil Co., 646 F.2d 946 (5th Cir. 1981), *cert. denied* 102 S.Ct. 1254 2

B. Statutes

Emergency Petroleum Allocation Act, 15 U.S.C. § 751 *et seq.* 3, 6

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

This Reply Brief is filed in support of the Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals filed by petitioners in this Court on September 15, 1982. Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Temporary Emergency Court of Appeals of the United States entered on August 16, 1982 in this case.

INTRODUCTION

The Brief in Opposition filed by the respondents is a carefully constructed but ultimately unpersuasive attempt

to convince this Court that the Temporary Emergency Court of Appeals ("TECA") did nothing out of the ordinary, decided no issue of substantial federal importance, and does not merit this Court's plenary review. Careful consideration of the Petition for a Writ of Certiorari, taken in the context of the District Court and TECA opinions appended thereto, clearly indicate, however, that a Writ of Certiorari should issue to TECA and that this Court should place this case down for full briefing and argument this term.

The bottom line is this: under state law, the petitioners clearly prevail. Under TECA's interpretation of the federal regulations, the respondents prevail. TECA's interpretation must therefore be erroneous, since neutral regulations, by definition, cannot change the outcome.

ARGUMENT

I. THE DECISION OF TECA CREATES A CONFLICT AMONG THE CIRCUITS CONCERNING THE JURISDICTIONAL PARAMETERS OF TECA. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THE PARAMETERS OF TECA'S JURISDICTION.

The decision of TECA creates a conflict among the circuits concerning the jurisdictional parameters of TECA. This court should grant certiorari to establish the parameters of TECA's jurisdiction. When read carefully, the Brief in Opposition documents that the position taken by TECA in the instant case was the identical position rejected by this Court in *Bray v. United States*, 423 U.S. 73 (1975), rejected by the Second Circuit in *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979), rejected by the Fifth Circuit in *United*

States v. Uni Oil Co., 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1254 and rejected by TECA itself in *Atlantic Richfield Company v. Department of Energy*, 655 F.2d 227 (TECA 1981). These courts have all limited TECA to jurisdiction over cases where an Emergency Petroleum Allocation Act ("EPAA") issue has been *adjudicated*. The respondents' position is that the mere *presence* of EPAA involvement, however tangential to the issues actually adjudicated, gives TECA sufficient jurisdiction to resolve any and all issues raised on appeal.

Respondents' position is revealed, perhaps unintentionally, in their selection of quotations from briefs filed by petitioners below. Respondents obtain solace from petitioners' statement in their Brief in Support of Named Plaintiffs' Motion for Class Action Certification that:

> "[T]he Yates Field Unit, ... although governed by private contract, is subject to a *supervening federal standard* of a set amount of stripper well pricing benefits to be dispersed to the entire unit." (emphasis in the Brief in Opposition, quoted at pp. 6-7 therein).

Careful examination of this statement reveals that petitioners were simply stating a fact not in dispute: the amount of stripper well pricing benefits to be dispersed throughout the entire unit is fixed by federal law. There is no dispute as to how much stripper well pricing benefits are available to the Yates Field Unit. The only question in the litigation is the proper method of apportionment of that fixed amount of stripper well pricing benefits. By the misuse of this statement, respondents have taken the position that simply because the EPAA lurks somewhere in the factual context, TECA has jurisdiction.

Similarly, respondents also quote from a later brief filed by petitioners to the effect that:

> "[their] claim to 'stripper well pricing benefits is totally dependent on individual tracts qualifying for stripper well pricing *prior* to unitization.' " (Brief in Opposition at page 7, quoting from Reply Brief in Support of Named Plaintiff's Motion for Summary Judgment and Answer Brief in Opposition to Named Defendants' Counter Motion for Summary Judgment, at page 12, R. 2433.)

The quoted passage appears grossly out of context. The entire relevant passage is as follows:

> "To the extent relevant, the federal energy regulations overwhelmingly support the plaintiffs' Motion for Summary Judgment.
>
> Throughout Exxon's 23-page excursus on federal regulatory law, Exxon consistently ignores the fundamental premise of the imputed stripper rule. 10 C.F.R. § 212.75(b)(ii). Whatever claim, however specious it may be, the Yates Field Unit participants have to stripper well benefits is totally dependent on individual tracts qualifying for stripper well pricing *prior to* unitization. (emphasis in original)

Read in context, several things become apparent. First of all, the petitioners were not asserting that federal law governs the issues resolved by the District Court. To the contrary, the petitioners' consistent position has been and continues to be that state law governs, and that federal law is not relevant. Federal law was only discussed because of the respondents' insistence on attempting to convert this

case into a federal energy dispute.[1] Secondly, the context reveals that "participants" included any or all the unit participants as a group and not the petitioners. The insertion of the word "their" by respondents is flagrantly misleading. Petitioners claim that their rights to stripper well pricing benefits arise from state law, pursuant to settled interpretations of the Federal Energy Administration and the Department of Energy.

A fair reading of the District Court opinion can only lead to the conclusion that the District Court's review of the federal energy regulations was done only for the limited purpose of determining *whether the federal regulations changed the outcome otherwise dictated by state law.* As a matter of state law, the District Court had determined that the unit agreements did not, and were not intended to, allocate the proceeds of sale of crude oil. An examination of federal regulations led the District Court to the obvious conclusion that the regulations did not change what state law would otherwise hold: *the petitioners retained the exclusive right to market the crude oil allocated to their tracts.*[2]

The TECA decision in the current case stands alone in its expansion of TECA's jurisdictional parameters. Standing alone it creates a conflict with other courts of appeal, the resolution of such conflict being imperative in view of the

[1]In the Reply Brief wherein the material is quoted, the argument immediately preceding the quoted material clearly argues that the right of the petitioners to charge stripper well prices for their oil is a private contractual right to be settled by Texas state law. See Reply Brief, at pp. 7-11, R. 2428-2432.

[2]The cavalier treatment by TECA of the District Court's expert opinion of state law violated the settled principle that a district court's interpretion of state law is entitled to great weight. *See, e.g., Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956); *Gardner v. New Jersey,* 329 U.S. 565 (1947).

large economic consequences to the oil and gas industry. See *infra*, at page 8.[3]

II. TECA HAS DECIDED A QUESTION OF SUBSTANTIAL FEDERAL IMPORTANCE THAT THIS COURT HAS NOT PREVIOUSLY CONSIDERED. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THIS ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE.

TECA has decided a question of substantial federal importance that this court has not previously considered. This court should grant certiorari to consider this issue of substantial federal importance.

In stating that TECA had decided an issue of federal importance, the petitioners did not suggest that TECA had jurisdiction to decide this issue. Rather, TECA took it upon itself to decide the case on appeal in such a manner to both create and resolve a substantial federal issue: the interpretation of several regulations under the federal

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[3]The cases of *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711 (TECA 1979), *cert. denied* 444 U.S. 879 and *Mountain Fuel Supply Co. v. R. Johnson, et al*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied* 444 U.S. 952, are not to the contrary. In both cases the plaintiff sued under breach of contract and the defendant purchaser defended on the basis of illegality under the EPAA. TECA had jurisdiction because

> "the resolution of the litigation in its entirety requires application and interpretation of the EPAA..." *Citronelle, supra*, 591 F.2d at 716.

A decision by TECA on the EPAA issue would thus resolve the entire litigation. In the present case, the dispositive issue is not an EPAA issue but an issue of state law. TECA cannot resolve the entire litigation. See, *Texaco, Inc. v. Department of Energy*, 616 F.2d 1193, 1197 n. 2 (TECA 1979).

energy regulatory scheme. The fact that TECA took it upon itself to decide this issue is not an indication that this issue was properly presented in the case before TECA.

In any event, assuming that TECA had jurisdiction to resolve these issues, TECA's interpretation of the federal energy regulations is clearly erroneous and must be reversed by this Court. The Brief in Opposition has unsuccessfully attempted to disguise what TECA has done. Quite simply, TECA has turned the federal regulatory scheme on its head. While paying homage to the concept of neutrality, TECA has really enviscerated the concept of neutrality and state law determination. According to the dictates of the TECA decision, state law will not govern the allocation of imputed stripper oil. A rebuttable presumption, created by federal law, will govern the allocation of imputed stripper oil. For the stripper tract owner to retain his imputed stripper oil upon unitization, the unitization agreement would have to have a specific and unequivocal reservation of rights in the stripper tract owner. Without this clear and unequivocal statement, federal law will presume that the imputed stripper oil is to be allocated to all the participants in the unit, no matter what the supposedly governing state law would otherwise hold. This result cannot be what the FEA (later DOE) had in mind. The agency on several occasions specifically noted that state law would govern.

The District Court, quite unlike TECA, carefully heeded the principles set forth by the Federal Energy Administration and the Department of Energy. The District Court examined state law to determine the effect of state law on the allocation of imputed stripper oil. After determining that state law would leave those benefits in the stripper tract owner absent a prior unequivocal contractual provision to the contrary, the District Court then examined

the federal regulations for the limited purpose of determining whether those regulations overruled state law. Obviously, the federal regulations could not overrule state law since the federal regulations themselves are to be construed in a neutral fashion, with no bias towards either the stripper tract owner or the unit participants.

Again, the bottom line is this: under *state law*, the petitioners clearly prevail. Under TECA's interpretation of the federal regulations, the respondents prevail. TECA's interpretation must therefore be erroneous, since neutral regulations, by definition, cannot change the outcome.

The significance of the TECA decision in the oil and gas industry is perhaps best summarized by a concise analysis of the decision found in the Executive Report of the Independent Petroleum Association of America, a prominent trade organization of independent producers.[4] In its September, 1982 edition, the report discussed the effect of the TECA decision and requested that this court review the TECA decision:

> **"Will a unitized stripper lease owner be able to claim independent stripper well exemptions? and will TECA claim exclusive jurisdiction to hear appeal of tax cases involving windfall profit tax application of DOE regulations?**
>
> In summary, TECA held that under the imputed stripper well rule 'that a property qualified as a

[4]The Independent Petroleum Association of America was founded in 1929 and has a membership of 5700, composed principally of independent oil and gas operators, land and royalty owners and others interested in the production of crude oil and natural gas. One of its most important functions is to represent the interest of small oil and natural gas producers in legislative and regulatory areas at the federal level. Its executive offices are located at 1101 16 St., N.W., Washington, D.C.

> 'stripper well lease' prior to unitization would cease to qualify as separate property, with a separate exemption, upon unitization; . . . .' The court also held that "...the previous qualified stripper well leases retain significance only for purposes of calculating the quantity of imputed stripper oil these leases contributed to the unit." And "...more important, the (operators) lost the ability to claim, unilaterally, a stripper well crude oil exemption when their preunitization 'property" became part of the unit."
>
> **The TECA decision should be appealed to the U.S. Supreme Court.** (Executive Report at p. 2) (emphasis in the original).

Quite clearly, TECA has decided an important issue of federal law. This court should take the opportunity presented by the Petition for a Writ of Certiorari and definitively resolve the issue that TECA has decided.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case set for briefing and argument this term.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, J. Michael Medina, certify that on this 28th day of October, 1982 placed in the United States mail at Washington, D.C., three true and correct copies of the above and foregoing Reply Brief of Petitioners in Support of a Writ of Certiorari, with co. ect postage prepaid thereon, addressed to:

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